No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN COLLEGE OF PEDIATRICIANS, AND CHRISTIAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national medical organizations and their combined membership of thousands of physicians, nurses, physician assistants, pharmacists and other healthcare professionals who share a profound commitment to protecting maternal health and the sanctity of human life and who express that commitment through serving with and empowering pro-life pregnancy centers like Petitioners. *Amici's* members include physicians and nurses who serve as medical staff at pregnancy centers, obstetrician/gynecologists whose patients see abortion providers and then return to their care, emergency physicians and other staff who treat emergent complications caused by abortion, and clinical staff who counsel women regarding abortion and treat its damaging physical and psychological consequences.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization that consists of 3,000 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College/Congress of Obstetricians and Gynecologists (ACOG) from 1973 to 2013 until this designation was discontinued by ACOG. AAPLOG is concerned about

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief. The parties to this case have consented to the filing of this brief and letters indicating their consent are on file with the Clerk.

the quality of care provided to pregnant women and the potential long-term adverse consequences of abortion on women's future health, and explores data from around the world regarding abortion-associated complications (such as depression, substance abuse, suicide, other pregnancy-associated mortality, subsequent preterm birth, and *placenta previa*) in order to provide the general public and others with a realistic appreciation and understanding of abortion-related health risks.

American College of Pediatricians (ACPeds) is a national not-for-profit organization of pediatricians and other healthcare professionals formed in 2002 dedicated to the health and well-being of children. The mission of ACPeds is to enable all children to reach their optimal physical and emotional health and well-being. To this end, ACPeds has written a number of position statements on matters unique to children and continues to produce sound policy based upon the best available research to assist parents and society in the care of children. Membership is open to qualifying healthcare professionals who share the ACPeds' Mission, Vision, and Values. ACPeds currently has members in forty-seven states, as well as in several countries outside of the United States.

Christian Medical Association (CMA), founded in 1931, is a non-profit national membership organization primarily for physicians. With more than 19,000 members, CMA provides a public voice on bioethics and healthcare policy. CMA provides missionary doctors and medical education to the

developing world, provides continuing medical education, and sponsors student chapters at most U.S. medical schools.

SUMMARY OF ARGUMENT

The freedom of speech is a bedrock principle of our nation, enshrined in the Free Speech Clause of the First Amendment. The right to speak or not to speak, however, is not unlimited. There are certain narrow exceptions when the government can, in fact, compel speech, including in the commercial or professional context. But the disclosure required by the California Reproductive FACT Act is neither commercial speech nor professional speech. See Pet. Br. Part II.A–B. Nor does the Act regulate informed consent by any medical standard. See *id.* Part II.C.

Informed consent in the medical context requires a discussion of the risks, consequences, and alternatives of a specific proposed medical procedure. The limited medical services generally offered by pregnancy centers are pregnancy tests, limited ultrasounds, and sexually transmitted infection (STI) testing and treatment. The Act, however, requires licensed pregnancy centers (which retain medical officers and clinical staff from members of *Amici* professional groups) to disclose to anyone who enters the center that California has public programs that offer free or low-cost access to contraception, prenatal care, and abortion—services the centers do not offer as a matter of their conscientious (often religious) convictions. Information about State public programs providing access to contraception and abortion is not a risk, consequence, or alternative to a pregnancy

test, a limited ultrasound, or STI testing. As such, the required disclosures cannot properly be considered informed consent for any of the medical services provided by pregnancy centers.

Pregnancy centers follow industry standard procedures for all medical services that they offer, which are the same procedures used by other clinics, including those offering abortion procedures. Pregnancy centers also maintain high professional standards of care, are dedicated to providing the highest standard of patient care, and follow comprehensive and ethical guidelines, including the Hippocratic Oath.

The Act does not require a medical professional to discuss the disclosure with a client or ensure that the client understood its contents, which are essential elements of informed consent. A sign on the wall in the waiting room is not informed consent, and no legitimate medical practitioner would regard it as such.

The coerced disclosure mandated by the California Reproductive FACT Act does not operate as a regulation of the informed consent process for a specific medical procedure and, as such, violates the Free Speech Clause of the First Amendment.

ARGUMENT

I. Pregnancy centers offer limited medical services pursuant to generally accepted standards of practice, the Hippocratic Oath, and comprehensive ethical guidelines and standards of care.

Pregnancy centers are not-for-profit charitable institutions that exist to provide care and encouragement for expectant women who choose to carry their pregnancies to term. They do so by offering free information and educational resources on prenatal development, nutrition, adoption, childcare, and social services available to new mothers; baby clothing and accessories; and referrals for structural supports like housing and employment.

A. Pregnancy centers offer limited medical services, which do not include abortion, pursuant to generally accepted standards of practice.

Pregnancy centers also provide certain limited medical services under the supervision of licensed clinical medical directors who serve without compensation. Licensed centers generally provide three principal forms of medical services—all free of charge.

Pregnancy tests. Generally, a woman is given a urine pregnancy test kit, which detects hCG (human chorionic gonadotropin), a hormone produced by the placenta during pregnancy. Occasionally, a

pregnancy center will conduct a blood pregnancy test to detect the presence of hCG in the blood.

Limited ultrasounds. A limited ultrasound is one which is "performed when a specific question requires investigation."[2] Pregnancy centers conduct limited ultrasounds to confirm the presence of an intrauterine (as opposed to ectopic) pregnancy and, in some cases, to offer an estimate of gestational age.

Sexually Transmitted Infection (STI) testing. Some pregnancy centers also provide testing for sexually transmitted infections. This is done (depending on the type of STI involved) by taking a swab sample of the affected area or by urine testing. A blood test may be utilized to follow up some preliminary diagnoses.

These limited medical services—none of which are abortion—are provided under guidelines established by medical directors and incorporated into "standing orders" for center staff. Additionally, licensed clinical staff may provide specific care to individual clients within their area of expertise.

Pregnancy centers inform prospective clients of the limited nature of the services they offer before agreeing to provide medical services, and in turn, the prospective clients acknowledge in writing the limited scope of services to be provided. Pregnancy centers also obtain written informed consent for the limited

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[2] Am. Institute of Ultrasound in Med., AIUM Practice Parameter for the Performance of Obstetric Ultrasound Examinations 2 (2013), www.aium.org/resources/guidelines/obstetric.pdf.

medical services they provide by communicating the risks and benefits of those procedures before they are administered.

Thus, pregnancy centers and their licensed clinical staff do not assume any obligation to provide primary or ongoing care to maternal or fetal clients. Nor do they provide emergent care; if a situation appears to involve a medical emergency, pregnancy center staff will instruct the woman to immediately contact her attending physician or go to an emergency room. Likewise, if pregnancy centers determine that a client is pregnant, staff encourage the client to locate a physician to provide prenatal care. If needed, centers will provide referrals to medical practitioners who offer such care.

B. Pregnancy centers can limit what services they provide under generally accepted standards of practice and the Hippocratic Oath.

Under generally accepted standards of practice, licensed clinical staff at pregnancy centers have no ethical obligation to treat all prospective patients who present in a non-emergency situation. Medical practitioners may decline to enter into a physician-patient relationship for many reasons, including those recognized by the American Medical Association (AMA). Under the AMA Code of Medical Ethics, appropriate grounds for limiting the scope of care include: (i) when providing a specific legal treatment option would be incompatible with the physician's personal, religious, or moral beliefs; and (ii) when the physician lacks resources to provide

comprehensive care to the patient. AMA Code of Medical Ethics Op. 1.1.2(a)–(b) (Prospective Patients). Another basis for limiting services is when the medical practitioner concludes, based on his or her professional judgment, that a therapy will provide no medical benefit or will result in harm to the patient.[3] Examples may include certain forms of bariatric surgery, female genital mutilation, or a patient who exhibits drug-seeking behavior requesting a refill for an opioid prescription. In circumstances involving a recognized basis for limiting services, the AMA Code of Medical Ethics does not require the medical practitioner to discuss the requested services or to provide a referral to a physician who may provide them.

Pregnancy centers and *Amici* follow the AMA Code of Medical Ethics, as well as the ethical guidelines articulated in the Hippocratic Oath as their basis for professional care of patients. The Oath defines the scope of the physician-patient relationship. It imparts to the physician fiduciary responsibilities to act at all times in the best interests of his or her patient, while simultaneously forbidding acts which are intrinsically harmful to patients, including euthanasia and elective abortion.

This Court recognized the enduring value of the Oath in *Roe v. Wade*:

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[3] *See Nonmaleficence*, McGraw-Hill Concise Dictionary of Modern Medicine (2002) ("Nonmaleficence" is "[a] central guiding principle of the ethical practice of medicine, first expressed by Hippocrates, and translated into Latin as *primum non nocere*, first do no harm.").

> [The Hippocratic Oath] represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. . . . [With the end of Antiquity] [t]he Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth."

410 U.S. 113, 131–32 (1973) (quoting L. Edelstein, The Hippocratic Oath 63, 64 (1943)). *Roe* also affirmed the well-recognized bases of personal convictions and medical judgment for declining to offer certain medical services, citing favorably an AMA House of Delegates' resolution that stated:

> [N]o physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.

Id. at 143 n.38 (quoting Proceedings of the AMA House of Delegates 220 (June 1970)). Further, this Court in *Doe v. Bolton* left in place a statutory provision that permitted hospitals to decline to admit patients for abortions and prohibited hospitals from requiring medical professionals to perform or assist in abortions, calling the provision an "appropriate protection to the individual and to the denominational hospital." 410 U.S. 179, 197 (1973).

Thus, both *Roe* and *Doe* affirmatively reject the notion that the State has the right to require a medical professional to participate in abortion against his or her conscience or professional judgment.

When a medical practitioner cannot provide certain treatments in good conscience, it is proper practice to disclose the specific interventions or services the medical practitioner cannot provide. See AMA Code of Medical Ethics Op. 1.1.7(b) (Physician Exercise of Conscience). Medical practitioners may do this before entering into a professional relationship with a prospective patient, but they may also do so at any point after the relationship has been established when it has become clear from their interaction that the treatment is a medically indicated option that they cannot provide. The patient is then free to seek such services from another qualified professional.

When a medical practitioner agrees to provide a specific medical procedure, standards of medical practice require that the medical practitioner obtain informed consent for the procedure. The duty to obtain informed consent is shaped and limited by the nature of the particular care agreed upon. When a limited course of medical care has been offered and agreed upon, current standards of medical practice do not require the medical practitioner to provide medical advice about risks and benefits of therapeutic options that are outside the limited agreed-upon scope of care. Providing such medical advice is regarded as providing medical care, which the medical practitioner may decline to provide as outlined above. Thus, a licensed clinical staff member at a pregnancy center is not obliged to provide

information that would be needed to obtain informed consent for a procedure he or she does not offer and would not provide to a patient.

C. Pregnancy centers, including members of *Amici* medical organizations, follow comprehensive ethical guidelines and standards of care.

Amici medical organizations require members to agree with their mission statements and core values, as well as follow ethical guidelines and standards of care that show a profound respect for life and informed consent. The mission statement of *Amicus* American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) states:

> We are committed to educate abortion-vulnerable patients, the general public, pregnancy care center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature; and [w]e are deeply concerned about the profound, adverse effects of elective abortion, not just on women, but also on the entire involved family, and on our society at large.[4]

The Core Values and Objectives of *Amicus* American College of Pediatricians (ACPeds) call on members to:

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[4] AAPLOG, *Our Mission Statement* (2016), http://aaplog.org/about-us/our-mission-statement/.

- Recognize[] the unique value of every human life from the time of conception to natural death and pledge[] to promote research and clinical practice that provides for the healthiest outcome of the child from conception to adulthood. . . .
- Recognize[] that health professionals caring for children must maintain high ethical and scientific standards and pledge[] to promote such practice. . . .
- [P]romote the highest standards of medical practice among its Members and within the field of pediatrics.[5]

Finally, *Amicus* Christian Medical Association's (CMA) ethical guidelines for their membership includes the following standards:

- We will do no harm to our patients by acts of either omission or commission. . . .
- We hold all human life to be sacred as created in God's image. . . .
- We affirm the standard of honesty in all circumstances.
- We believe that our patients have the right to be carefully taught about all aspects of their disease and treatment so that they may give consent that is properly informed.[6]

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[5] ACPeds, *About Us* (2016), https://www.acpeds.org/ about-us.

[6] CMA, *Principles of Christian Excellence Ethics Statement* (1991), https://www.cmda.org/resources/publication/principles-of-christian-excellence-ethics-statement.

These principles of medical ethics are also embodied in nationally recognized standards of care for pregnancy care centers. National pregnancy center organizations, to which most pregnancy centers belong, require compliance with comprehensive standards of care. Affiliates must abide by these stringent guidelines in order to maintain affiliation.

For example, affiliates of Care Net and numerous other national pregnancy center organizations are required to abide by a "Commitment of Care and Competence." This detailed code of practice—which is strictly followed by licensed pregnancy centers (including by members of *Amici* medical organizations) in California and across the nation—mandates that:

- Client pregnancy tests are distributed and administered in accordance with all applicable laws. . . .
- Clients receive accurate information about pregnancy, fetal development, lifestyle issues, and related concerns.
- [Center staff] do not offer, recommend or refer for abortions or abortifacients, but are committed to offering accurate information about abortion procedures and risks. . . .
- Medical services are provided in accordance with all applicable laws, and in accordance with pertinent medical

> standards, under the supervision and direction of a licensed physician.[7]

Therefore, despite claims to the contrary by Respondents and others, organizations and individual medical professionals with moral, ethical, or scientific objections to certain elective procedures are not abdicating their ethical duties to their patients. To the contrary, *Amici* medical professionals and the pregnancy centers they support adhere to a higher ethical standard which requires them to at all times to protect the lives of the patients entrusted to their care, both born and unborn, and to ensure that their patients are given the highest quality of care available under the specific sets of circumstances.

II. The Act's coerced disclosure bears no relation to informed consent for the limited medical services offered by pregnancy centers.

A. Under *Casey*, a state can regulate informed consent for specific medical procedures, including abortion.

The First Amendment provides broad free speech protections to healthcare professionals, including the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); see also *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014) ("[D]octor-

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[7] Care Net, Commitment of Care & Competence (2009), https://cdn2.hubspot.net/hub/367552/file-2184391815-pdf/Commitment-of-Care-Comp-6-09-C.pdf?t=1515701103876.

patient communications about medical treatment receive substantial First Amendment protection."); *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (affirming injunction prohibiting government from threatening revocation of a physician's license for recommending medical use of marijuana). These protections, however, are not unlimited. As this Court explained in *Casey*, a State may regulate speech in the context of informed consent. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992) (plurality opinion); see also *id.* at 884 (explaining that even when physicians' First Amendment right not to speak is implicated as part of the practice of medicine, it is "subject to reasonable licensing and regulation by the State").

Informed consent is defined in the American College of Obstetricians and Gynecologists (ACOG) *Guidelines for Women's Health Care* as "the willing and uncoerced acceptance of a medical intervention by a patient after appropriate disclosure by the clinician of the nature of the intervention and its risks and benefits as well as the risks and benefits of alternatives." ACOG, Guidelines for Women's Health Care 80 (3d ed. 2007) True consent is "the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each [option]." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972). "The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012); *see also Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) ("Grounded in self-

determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has the information she needs to meaningfully consent to medical procedures." (internal quotation marks omitted)); AMA Code of Medical Ethics Op. 2.1.1 (Informed Consent) ("Patients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care.").

In practice, medical practitioners are "responsible for securing the patient's informed consent" for the specific medical procedure, and all such discussions and information materials provided "should be documented appropriately in the patient's medical record." Guidelines for Women's Health Care, *supra*, at 125.

Under the AMA Code of Ethics, a medical practitioner seeking informed consent should:

> (a) Assess the patient's ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision.
>
> (b) Present relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information. The physician should include information about:
>
> 1. The diagnosis (when known)

> 2. The nature and purpose of recommended interventions
> 3. The burdens, risks, and expected benefits of all options, including forgoing treatment
>
> (c) Document the informed consent conversation and the patient's . . . decision in the medical record in some manner.[8]

Undoubtedly, informed consent for an abortion procedure is a proper subject for state regulation. In *Casey*, this Court stated, "[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U.S. at 884. States can have legitimate concerns about women receiving information concerning the way in

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[8] AMA Code of Medical Ethics Op. 2.1.1 (informed consent); see also Peter Lars Jacobson, *Valid Informed Consent in Clinical and Academic Practice*, 14 (Univ. of N.C.), http://beta.aan.com/globals/axon/assets/6115.pdf (Valid informed consent in clinical practice has three elements: (1) the ability to understand and decide, i.e., capacity; (2) disclosure of material information and recommendations; and (3) a decision without undue influence or coercion.); *Stuart*, 774 F.3d at 351–52 (Informed consent has two essential elements: (1) comprehension, or the requirement that "the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option"; and (2) free consent, or the requirement that "the patient be able to exercise her autonomy free from coercion.").

which the fetus will be killed in the exercise of abortion choice. *Id.* at 873; see also *id.* ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"); *id.* at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."); *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("The State has an interest in ensuring so grave a choice is well informed.").

Informed consent for abortion, properly circumscribed, imposes no unconstitutional impediment to abortion:

> "[W]hen the government requires [as part of the informed consent process] . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth," and other information broadly relevant to the decision to have an abortion, it does not impose an undue burden on abortion rights, even if the disclosure "might cause the woman to choose childbirth over abortion."

Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (quoting *Casey*, 505 U.S. at 882–83) (alterations in original). However, for the reasons discussed below, the Act's coerced disclosures are no part of informed consent for the provision of abortion.

B. The Act's coerced disclosure is not informed consent for any medical procedure.

The Act requires the following disclosure be posted at the pregnancy center: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472(a)(1). The notice can be disclosed in one of three ways: (1) a posted public notice; (2) a printed notice; or (3) a digital notice. *Id.* § 123472(a)(2).

This mandated disclosure is not informed consent. First, there is no requirement for patient understanding. The Act does not require a health care practitioner—or any pregnancy center staff—to ensure that the client saw the disclosure, much less has the ability to understand its contents. Second, the disclosure is not part of informed consent for a proposed medical procedure. There is no relation between the disclosure and any medical procedure the pregnancy center offers. Third, the pregnancy center is unable to present the relevant information accurately and sensitively. The Act has no flexibility of when and how the disclosure is conveyed (other than in one of three methods—posted, print, or digital). Fourth, the disclosure is not limited to clients or for patients; it is for anyone who walks into the pregnancy center waiting room or inquires about services before a patient or client relationship is

formed. Finally, the Act has no documentation requirement. In short, the coerced disclosure is not any part of proper informed consent.

C. The Act's coerced disclosure is not informed consent for the limited medical services offered by pregnancy centers.

Not only does the coerced disclosure not constitute informed consent, it has no relation to informed consent for the limited medical services that are actually provided by pregnancy centers. Informed consent requires discussion of the risks and benefits and the alternatives related specifically "to the *proposed procedure, test, or treatment.*" Guidelines for Women's Health Care, *supra*, at 125 (emphasis added). For example, in *Casey*, this Court upheld a state informed consent law that required that a woman be informed of the risks, consequences, and alternatives to abortion before the abortion procedure is performed. 505 U.S. at 881. Likewise, a state could require informed consent relating to the risks, consequences, and alternatives of the medical services offered by licensed pregnancy centers—pregnancy tests, limited ultrasounds, or STI testing. But see *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1316 (11th Cir. 2017) ("[A] state's authority to regulate a profession does not extend to the entirety of a professional's existence."). But the subject matter of the Act's disclosure—contraception, prenatal care, and abortion—is not a benefit, risk, or alternative to pregnancy tests, limited ultrasounds, or STI testing. The cost or lack thereof of the government programs is, likewise, not related to a benefit, risk, or alternative to a free pregnancy test, limited

ultrasound, or STI testing. Nothing in the coerced disclosure involves informed consent relating to the medical services provided by pregnancy centers. Thus, the Act's coerced disclosure cannot pass muster as an appropriate regulation of medical informed consent.

CONCLUSION

Insofar as the California Reproductive FACT Act does not regulate the process of informed consent, it constitutes coerced speech in violation of the First Amendment. Therefore, *Amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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